# Guideline Sentencing Update

*a publication of the Federal Judicial Center* *volume 8, number 2, November 28, 1995*

## Departures

### Mitigating Circumstances

**Second Circuit affirms small downward departure for antitrust defendant because his imprisonment would have imposed "extraordinary hardship on the defendant's employees."** Defendant was convicted of one count of price fixing and faced a guideline range of 8–14 months, which requires imprisonment for at least half the minimum term. *See* §5C1.1(d). The district court granted defendant's request for a departure of one offense level, which would allow defendant to avoid prison. The court concluded that imprisoning defendant "would extraordinarily impact on persons who are employed by him" and placed defendant on two years' probation, with the first six months in home confinement.

The appellate court affirmed, finding that the departure was legally appropriate and supported by the facts of the case. The court acknowledged that under §2R1.1, the guideline that applied to defendant, "antitrust offenders should generally be sentenced to prison" and that "the business effects of a white collar offender's incarceration generally provide no ground for departure." However, "a district court not only can, but must, consider the possibility of downward or upward departure 'when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest.' . . . Among the permissible justifications for downward departure, we have held, is the need, given appropriate circumstances, to reduce the destructive effects that incarceration of a defendant may have on innocent third parties," such as family members under §5H1.6. "The issue before us, then, is whether the facts considered by the district court comprise such 'extraordinary circumstances,' falling outside the heartland envisioned by the Antitrust Guideline. Our *de novo* review . . . makes clear that extraordinary effects on an antitrust offender's employees, 'to a degree[ ] not adequately taken into consideration by the Sentencing Commission,' warrant a downward departure."

The court then held that the district court properly found that defendant's "situation [was] extraordinary when it distinguished his case from other 'high level business people' it had sentenced." The record showed that defendant's remaining "companies' continuing livelihood depends entirely on [his daily] personal involvement, and that, in his absence, [their main creditor] might well withdraw its credit, leading to both companies' immediate bankruptcy and the loss of employment for [at least] 150 to 200 employees." It was not error to find that imprisoning defendant "would have extraordinary effects on his employees to a degree not adequately taken into consideration by the Sentencing Commission. While we agree with our sister circuits that business ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate, . . . departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees. As we have noted in similar circumstances, the Sentencing Guidelines 'do not require a judge to leave compassion and common sense at the door to the courtroom.'"

*U.S. v. Milikowsky,* 65 F.3d 4, 6–9 (2d Cir. 1995).

See *Outline* at VI.C.1.e.

### Extent of Departure

**Seventh Circuit holds that defendant may appeal calculation of sentencing range even if new range would be above sentence defendant had received after downward departure.** The district court determined that defendant's guideline range was 121–151 months. After the government recommended a 25% downward departure for substantial assistance, the court sentenced defendant to 91 months. Defendant appealed, arguing that he should have received a reduction in his offense level for being a minor participant, reducing his guideline range to 100–125 months, and that the 25% departure should have been made from the lower range.

As an initial matter, the appellate court faced "a jurisdictional question: whether a defendant may appeal the computation of his sentencing range, when he already has a sentence below the lower bound of the range he thinks is right." The court said yes, even though the extent of a discretionary departure is normally unreviewable: "Correction of a legal error often leads to a revision in the judgment, and the possibility that the district judge will impose the same sentence does not preclude review. . . . Unless the judge expressly states that he would impose the same sentence whichever range is correct, . . . the defendant has the *potential* for gain on a remand, because the district judge may have meant to grant a substantial discount from the properly calculated range. . . . The treatment of overlapping guideline ranges . . . offers a close parallel—with the difference that instead of two overlapping guideline ranges we have one range plus a zone of reasonable departures. If the district judge had said that he would impose a 91-month sentence whether

or not he thought Burnett a 'minor' participant, then there would be no point to this appeal. As things stand, however, the actual sentence may be a 'result' of the decision about minor-participant status. . . . It is in the interest of the legal system and defendants alike to ensure that even 'discounted' sentences rest on a legally correct foundation. We therefore conclude that [18 U.S.C.] §3742(a)(2) provides jurisdiction to entertain a claim that an error in the calculation of the guideline range influenced the sentence, whether or not that sentence ultimately falls below the properly calculated range."

However, the court ultimately affirmed the sentence after concluding that defendant's claim to minor participant status was not supported by the facts. Note that two other circuits have addressed this jurisdictional question and reached different conclusions. *Compare U.S. v. Hayes*, 49 F.3d 178, 182 (6th Cir. 1995) (because defendant alleged a "specific legal error," court would review 113-month sentence imposed after §5K1.1 departure even though it was below guideline range that would result if defendant's appeal of §3C1.2 enhancement succeeded; sentence remanded for further findings on whether §3C1.2 should be applied) *with U.S. v. Dutcher*, 8 F.3d 11, 12 (8th Cir. 1993) (affirmed: although defendant claimed that §3B1.1(a) enhancement was improper and his guideline range should have been 108–135 months rather than 168–210 months, court would not review 84-month sentence imposed after §5K1.1 departure—even if defendant's claim was correct, "his eighty-four month sentence would still represent a downward departure from the applicable guideline range [and] would still be non-reviewable").

*U.S. v. Burnett*, 66 F.3d 137, 138–40 (7th Cir. 1995).

See *Outline* at VI.D.

# General Application

## Amendments

**Eighth and Ninth Circuits hold that 1991 amendment clarifying that career offender provision does not apply to felon-in-possession offense should be applied retroactively, but amendment to §2K2.1 that increased offense level for that offense cannot.** Both defendants committed the offense of being a felon in possession of a firearm, and were sentenced as career offenders, before the Nov. 1991 amendment to §4B1.2's commentary (Amendment 433) "clarified" that the career offender guideline did not apply to that offense. After the amendment was made retroactive (Amendment 469) in Nov. 1992, both defendants sought resentencing. Application of Amendment 433 to the pre-1991 guidelines they were originally sentenced under would significantly lower their sentences, mainly by eliminating application of the career offender provision. Both district courts did apply Amendment 433, but instead of using the offense guideline in effect at the time of defendants' offenses or original sentencing they used a post-Nov. 1991 version of §2K2.1, which had been amended to increase the base offense level for the felon-in-possession offense but was not made retroactive. The courts reasoned that amended §2K2.1 could be used because it did not result in a harsher sentence than what defendants were originally subject to under the pre-Nov. 1991 guideline and then-existing circuit law. Defendants appealed and, following different reasoning, both appellate courts remanded.

The Ninth Circuit held that using the later version of §2K2.1 was an ex post facto violation because it "imposes a base offense level 15 levels higher than that imposed under the 1988 version—resulting in a harsher punishment under the later Guidelines. . . . The government has erroneously assumed that the proper comparison is between the 84-month sentence initially imposed on Hamilton under the 1988 Guidelines and the 77-month sentence imposed upon him at resentencing. This comparison is inappropriate, however, because it is based on the sentencing court's initial sentencing 'error.' . . . [W]hen the sentencing court initially sentenced Hamilton, it erred in calculating his sentence; instead of being sentenced to 84 months, Hamilton should have been sentenced only to 12 to 18 months. Therefore, we must compare the sentence that Hamilton received upon resentencing, 77 months, to the sentence that he should have received originally, 12 to 18 months." To properly resentence defendant, the court held, "the sentencing court is to apply the Guidelines in effect at the time of the offense, but must also consider the clarification provided by Amendment 433. As we conclude that application of the 1993 Guidelines indeed violates the Ex Post Facto prohibition, . . . the sentencing court [must] apply the Guidelines in effect at the time of the offense—the 1988 Guidelines—in light of Amendment 433."

The Eighth Circuit, rejecting the government's argument that Amendment 433 "is plainly inconsistent with both pre- and post-November 1991 law" and should not be applied retroactively, concluded that "the Commission's decision that the change is clarifying and suitable for retroactive use is not at odds with the Guidelines. . . . [T]he amendment raising the base offense level for felon-in-possession is best understood as a decision by the Commission that this crime was too leniently punished under the correct interpretation of its pre-November 1991 Guidelines. . . . Douglas seeks resentencing wholly under the Guidelines version employed by the original district court, but in light of a retroactive amendment clarifying that the court applied the wrong provision of that version. We conclude that Douglas is entitled to the relief that he seeks." Using the later version of §2K2.1, which was not designated for retroactive applica-

tion, would also be inconsistent with §1B1.10, comment. (n.2) (when applying a retroactive amendment, "the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.").

*Hamilton v. U.S.*, 67 F.3d 761, 764–65 (9th Cir. 1995); *U.S. v. Douglas*, 64 F.3d 450, 451–53 (8th Cir. 1995). *But cf. U.S. v. Lykes*, 999 F.2d 1144, 1148–50 (7th Cir. 1993) (not an ex post facto violation to apply amended §2K2.1 and Amendment 433 to defendant sentenced in 1992 for 1990 offense; alternatively, if applying later guideline would violate ex post facto, Amendment 433 would not be applied to 1989 Guidelines because it was a substantive change that conflicted with circuit precedent).

See *Outline* at I.E and IV.B.1.b.

# Sentencing Procedure

## Waiver of Rights in Plea Agreement

**Ninth Circuit upholds unconditional waiver of right to appeal sentence despite change in law between time of plea and sentencing.** As part of the plea agreement defendant "waived 'the right to appeal any sentence imposed by the district judge.' The waiver was not conditioned on the imposition of any particular sentence or range." With a downward departure under §4A1.3 because his criminal history score overstated the seriousness of his prior offenses, defendant was sentenced to the 10-year mandatory minimum. After the plea agreement but before defendant was sentenced, Congress enacted 18 U.S.C. §3553(f), which allows drug offenders to be sentenced below applicable mandatory minimum terms if they meet certain requirements. The district court itself raised the issue of whether defendant might qualify, but ultimately ruled that he could not because he had three criminal history points and §3553(f) applies only if defendant "does not have more than 1 criminal history point, as determined under the sentencing guidelines." Defendant appealed, arguing (1) that the district court erred in ruling that he could not qualify for §3553(f) (presumably by departure to a lower criminal history score), and (2) that he should not be held to his waiver because he could not knowingly and intelligently waive the right to appeal the application of a law that did not exist at the time of his plea agreement.

The appellate court held that the waiver was valid and dismissed the appeal. "The temporal scope of an appeal waiver appears to be an issue of first impression in the federal courts. . . . We hold that Johnson's appeal waiver encompasses appeals arising out of the law applicable to his sentencing. On its face, Johnson's waiver does not appear to be limited to issues arising from the law as it stood at the time of his plea: the waiver refers to 'any sentence imposed by the district judge,' not 'any sentence imposed under the laws currently in effect.' Although the sentencing law changed in an unexpected way, the possibility of a change was not unforeseeable at the time of the agreement. Johnson was presumably aware that the law in effect at the time of sentencing, not the time of the plea, would control his sentence if the change in law did not increase his sentencing exposure. . . . Therefore, a waiver of an appeal of 'any sentence' is most reasonably interpreted as intending to waive appeals arising out of the district court's construction of the laws that actually determine Johnson's sentence, regardless of when they were enacted." The court also held that "the waiver could be knowing and voluntary as to laws enacted after the plea was entered into. . . . The fact that Johnson did not foresee the specific issue that he now seeks to appeal does not place that issue outside the scope of his waiver."

*U.S. v. Johnson*, 67 F.3d 200, 202–03 (9th Cir. 1995).

See *Outline* at IX.A.5.

## Fed. R. Crim. P. 35(c)

**Second Circuit holds that "imposition of sentence" for purposes of Rule 35(c)'s seven-day limit refers to the oral pronouncement of sentence.** Four days after defendant was sentenced, and before written judgment of sentence was entered, the district court entered an order stating that there may be other factors relevant to the sentence that were not accounted for and that it was considering correcting the sentence under Fed. R. Crim. P. 35(c). However, because this could not be accomplished within the seven-day limit of the rule, the court reserved the right to correct the sentence if error was found. Almost six months later, at another sentencing hearing, the district court reconsidered the sentence and departed downward.

The appellate court reversed, holding first that the "correction" in this case—a downward departure—"is clearly outside the scope of the rule. By its terms Rule 35(c) permits corrections of 'arithmetical, technical, or other clear error[s].' . . . Since Abreu-Cabrera's resentencing represented nothing more than a district court's change of heart as to the appropriateness of the sentence, it was accordingly not a correction authorized by Rule 35(c)."

The court also had to answer "the question of whether 'imposition of sentence' refers to the oral pronouncement of a defendant's sentence or the docket entry of a written sentence (which was not done with respect to the oral pronouncement of Abreu-Cabrera's original sentence)," to determine whether Rule 35(c) actually applied here. Reasoning that the purpose of the rule is finality in sentencing, the court held that "a sentence is imposed for purposes of Rule 35(c) on the date of oral pronounce-

ment, rather than the date [the written] judgment is entered. . . . A contrary rule, interpreting the phrase to refer to the written judgment, would allow district courts to announce a sentence, delay the ministerial task of formal entry, have a change of heart, and alter the sentence—a sequence of events we believe to be beyond what the rule was meant to allow." *Accord U.S. v. Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994) ("sentence is imposed upon a criminal defendant, for purposes of Rule 35(c), when the court orally pronounces sentence from the bench"). *See also U.S. v. Fahm*, 13 F.3d 447, 453 (1st Cir. 1994) ("judgment and docket entry plainly reflect that the twenty-month prison sentence was 'imposed'" for purposes of Rule 35(c)). *But see U.S. v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994) (stating that "date of 'imposition of the sentence' from which the seven days runs signifies the date judgment enters rather than the date sentence is orally pronounced"; when district court, after reconsidering original sentence and deciding not to change it, entered final judgment twelve days after oral pronouncement of sentence, "it acted within the time constraints of" Rule 35(c)).

*U.S. v. Abreu-Cabrera*, 64 F.3d 67, 72–74 (2d Cir. 1995).

See *Outline* at IX.F.

### Certiorari granted:

*U.S. v. Melendez*, 55 F.3d 130 (3d Cir. 1995), *cert. granted*, 64 U.S.L.W. 3340 (U.S. Nov. 6, 1995) (No. 95-5661). "Question presented: Does district court have discretion to depart below applicable statutory minimum sentence when government has filed motion pursuant to Section 5K1.1 for downward departure from applicable range under federal Sentencing Guidelines but government has not filed motion under 18 U.S.C. §3553(e) for departure below statutory minimum?" See also the summary of *Melendez* in 7 *GSU* #10 and the *Outline* at section VI.F.3 (p.196).

### Amended opinion:

*U.S. v. Camp*, 58 F.3d 491 (9th Cir. 1995) [7 *GSU* #11], has been superseded by an amended opinion issued Oct. 3, 1995. The holding remains largely the same but has been narrowed, with the court stressing that the grant of immunity must have been initiated by the state, thereby making the self-incriminating evidence state-induced. This distinguishes the holding from *U.S. v. Eliason*, 3 F.3d 1149, 1153–54 (7th Cir. 1993) and *U.S. v. Roberson*, 872 F.2d 597, 611–12 (5th Cir. 1989), which allowed such evidence to be used where the defendants had actively bargained with the state for the immunity. Please adjust the entries in the *Outline* for *Camp* at sections I.C (p.9) and VI.A.1.c (p.148) as necessary, and change the cite to 66 F.3d 185, 186–87.

### Vacated opinion:

*U.S. v. Shields*, 49 F.3d 707 (11th Cir. 1995), *vacated upon granting of reh'g en banc*, 65 F.3d 900 (11th Cir. 1995). *Shields* was summarized in 7 *GSU* #9 and the *Outline* at section II.B.2 (p.33).

### Guideline amendments:

Please delete the note in the *Outline* at section II.B.3 (p.35) regarding the proposed amendment to lower crack sentences. Congress has disapproved the amendments relating to the equalization of crack and powder cocaine sentences and to sentences for money laundering and transactions in property derived from unlawful activity. *See* P.L. 104-38 (Oct. 30, 1995). All other amendments noted in the *Outline* are effective as of Nov. 1, 1995.

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